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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

DEBRA J. GRUNWALD, *et al.*,

Petitioners,

v.

SAN BERNARDINO CITY UNIFIED SCHOOL DISTRICT, *et al.*,

Respondents.

On Petition For a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITIONERS' REPLY BRIEF

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ARGUMENT

I. THE "ADVANCE REDUCTION" ISSUE IS PRESENTED HERE, BECAUSE THE UNION COLLECTS PORTIONS OF THE AGENCY SHOP FEES FROM OBJECTING NONUNION TEACHERS BEFORE THEY ARE OWED

Respondent San Bernardino Teachers Association ("the Association" or "union") acknowledges that there is "a disagreement among the circuits as to whether a union may collect from objecting nonmembers an agency fee that exceeds the amount properly chargeable to objectors, and then refund the difference at some later point." Brief in Opposition ("Opp.") at 9. Yet, the Association argues that certiorari should not be granted, because, it says, this "advance reduction" issue is not actually presented here, *see id.* at 11, even though the Ninth Circuit panel which decided this case obviously thought the contrary, since it divided on the issue.

The Association pretends that the advance reduction issue is not presented, because, under its scheme for collecting agency fees, Petitioner nonunion public school teachers ("the teachers") "did not pay, even into escrow, more than the chargeable amount for the school **year** in question." *Id.* (emphasis altered). However, the issue is presented, because the teachers owe fees to the Association on a **monthly**, not annual, basis. The statute which authorizes the Association to collect fees from the teachers states that the "service fee" is to be "in an amount not to exceed the * * * **periodic** dues * * * of the organization," Cal. Gov't Code § 3540.1(i)(2) (West Supp. 1993) (emphasis added), **not** in an amount not to exceed **annual** dues. Here, the periods for which dues are collected, and for which agency fees thus are owed, are the ten **months** of the school year, not entire fiscal years. Equal amounts become due each month. Petition Appendix ("App.") at 3a.

Because the Association collects an agency fee equal to dues every month, and only rebates the portions that admittedly represent nonchargeable activities after objecting nonmembers have paid full dues for three or seven months, depending on whether they just object or also challenge its calculation of the chargeable amount, during those months the objectors pay more than their pro rata share of the monthly costs of chargeable activities as calculated by the

Association. In short, for three or seven months the teachers are required to pay monies to which the Association indisputably is not entitled **when it collects them**.[1]

The logical extreme of the Association's argument graphically demonstrates its unconstitutional effect. The Association's theory would allow it to require objecting nonmembers to pay the entire chargeable agency fee in a single lump sum at the beginning of the school year, while permitting members and nonmembers who do not object to pay their dues and dues-equivalent fees in ten monthly installments. Under those circumstances, as under the scheme at issue here, objecting nonmembers would "not pay, even into escrow, more than the chargeable amount for the school year in question," Opp. at 11 (emphasis omitted).

However, nonmembers thus would impermissibly be faced with the dilemma of either relinquishing their First Amendment right to withhold their support of the union's nonbargaining activities or their right to pay the agency fee in installments. A public employee may not constitutionally be required to relinquish his right not to subsidize a union's political and ideological activities as a condition of exercising some other right or privilege. *See Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 241 (1977). Or to state the converse, the government may not deny an individual a benefit because of his or her exercise of First Amendment rights. *See Elrod v. Burns*, 427 U.S. 347, 358-61 (1976) (plurality opinion).

The penalty here for the exercise of the right to object is not as great as in the logical extreme, but it still exists. Using the example given in the Opposition at 8, under the Association's scheme, members and nonmembers who did not object had to pay only 30% ($90) and 70% ($210) of their annual financial obligation to the union ($300) in the first three and seven months of the school year.

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[1] It cannot be assumed that the Association makes no nonchargeable expenditures during the first three and seven months of the school year. That would be contrary to logic and common knowledge, particularly since the first two months are September and October, when most political expenditures are made in an election year. Nor can it be assumed that the monthly agency fees equal to dues paid during the first seven months represent only chargeable costs incurred in those months. *See Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 237 n.35 (1977).

However, nonmembers who objected had to pay 40.9% ($90) of their annual obligation ($220) in the first three months, and those who also challenged the amount had to pay 95.5% ($210) in the first seven months, all before they received a rebate.

The lesser degree of the penalty under the Association's scheme does not excuse it: "This Court's decisions have prohibited conditions on public benefits, in the form of jobs or otherwise, which dampen the exercise generally of First Amendment rights, however slight the inducement to the individual to forsake those rights." *Elrod*, 427 U.S. at 358 n.11; *see id.* at 359 n.13. Consequently, as *Teachers Local 1 v. Hudson*, 475 U.S. 292, 306 n.16 (1986) (emphasis added), held, the "nonmember's 'burden' [under a lawful arrangement for collecting agency fees] is **simply** the obligation to make his objection known." Because the Association imposes the additional burden on objectors of paying portions of the fees before they are due, this case presents the question of whether "advance reduction" is constitutionally required.[2]

II. BECAUSE COLLECTING COMPULSORY UNION FEES COMPELS ASSOCIATION AND TAKES PROPERTY, ADVANCE REDUCTION TO EXCLUDE UNDENIABLY NONCHARGEABLE AMOUNTS IS REQUIRED AS A MATTER OF FIRST AMENDMENT DUE PROCESS

The Association argues that *Hudson* did not hold that the First Amendment requires advance reduction of the amount collected from dissenters to exclude amounts that are admittedly nonchargeable, as well as escrow of disputed amounts, because the "union in *Hudson* used an advance reduction system." Thus, the Association claims, *Hudson*'s discussion of advance reduction "was directed at the question of adequacy of notice, not at any requirement of advance reduction as such." Opp. at 11 n.8 (emphasis omitted).

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[2] The question is also presented here for another reason. The Association's scheme does not guarantee that it will **never** collect more from objectors than it is entitled to on an annual basis. If the chargeable percentage in the year used in the Association's example had been 60%, rather than 73%, the fee for objectors would have been only $180, but the Association would have collected $210 before it gave any rebate to nonmembers who objected and challenged the amount of the fee.

However, *Hudson*, 475 U.S. at 309 (emphasis added), held that an "appropriately justified **advance reduction * * * [is] necessary** to minimize both the impingement [of the agency shop on employees' First Amendment interests] and the burden" of objection. "[A]dvance reduction," not "appropriate justification," is the **subject** of the Court's sentence; like the courts in *Damiano v. Matish*, 830 F.2d 1363, 1369-70 (6th Cir. 1987), and *Tierney v. City of Toledo*, 824 F.2d 1497, 1502-04 (6th Cir. 1987), the teachers presume that this Court meant what it said. It would hardly have been necessary to hold that the union must "provide adequate justification for the advance reduction of dues," *Hudson*, 475 U.S. at 309, if no advance reduction at all were required.

Moreover, advance reduction is essential to fulfillment of the principles on which *Hudson* rests. The Association argues that only spending of compulsory fees, not collection, gives rise to constitutional concerns. *See* Opp. at 9-10. It thus ignores two teachings of *Hudson*.

First, although "a 100% escrow completely avoids the risk that dissenters' contributions could be used improperly," additional procedural safeguards "are required because **the agency shop itself** impinges on the nonunion employees' First Amendment interests." *Hudson*, 475 U.S. at 309 (emphasis added). But, if the agency shop impinges on First Amendment rights even with no risk of improper spending, then not only spending constitutes the infringement, but also collection. Consequently, *Hudson*, 475 U.S. at 310 (emphasis added), enunciated "constitutional requirements for the Union's **collection** of agency fees," not just "'a way of preventing compulsory subsidization of ideological activity.'" *id.* at 302 (quoting *Abood*, 431 U.S. at 237).

The Petition at 16, 21-23 & n.27 cited cases, including *Elrod*, 427 U.S. at 355-56 (plurality opinion), which identify part of the First Amendment injury in cases such as this as the inability of individuals to use the funds seized from them for their own causes. *See Rutan v. Republican Party*, 497 U.S. 62, 69 (1990). Yet, the Association doubts that there is any "First Amendment right not to be deprived of the use of one's money," citing the Ninth Circuit majority's view that such a right "would turn every * * * monetary

claim against an entity acting under color of law into a First Amendment case," App. at 7a (punctuation omitted), and *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 705-06 (1986). Opp. at 12 & n.9. The principle on which the teachers rely is not so broad.

The taking of property to pay civil damages or taxes, or serve other governmental purposes "having nothing to do with" First Amendment conduct at all, as in *Arcara*, 478 U.S. at 705-07, does not give rise to a First Amendment claim simply because it "will have some effect on the First Amendment activities of those subject to" the taking. However, that is not this case.

Here, the taking of property gives rise to a First Amendment claim **because** the taking **serves goals that themselves infringe upon First Amendment freedoms**, as in *Elrod*, *Abood*, *Hudson*, and *Keller v. State Bar*, 496 U.S. 1 (1990). The First Amendment infringement inherent in the taking in these cases is forced association with a political party, union, or bar association through the coerced collection of party contributions, agency fees, or bar dues. *See Keller*, 496 U.S. at 13; *Hudson*, 475 U.S. at 301-02 & nn.8-9; *Elrod*, 427 U.S. at 355.[1] The inability of the individual to use those funds for their own expressive and associational purposes is an **additional** effect of the forced association recognized in *Elrod*, 427 U.S. at 355-56, and the other cases cited by the teachers. *See* David B. Yelin, *Constitutional Considerations Affecting the Methods of Exacting Union "Fair Share" Collective Bargaining Fees from Non-Member Public Employees*, 1985 Det. C.L. Rev. 767, 790-91.

When free association is infringed, even if only partially, as by the contribution limitations in *Buckley v. Valeo*, 424 U.S. 1, 22-23 (1976), the infringement may be sustained only "if the State demonstrates a sufficiently important interest and employs means **closely drawn** to avoid **unnecessary** abridgment of associational freedoms." *Id.* at 25 (emphasis added). In *Abood*, *Hudson*, and *Keller*, the Court found such a state interest, but only to the extent that compulsory fees are limited to a proportionate share of the costs

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[1] "Compelled support of a private association is fundamentally different from compelled support of government." *Abood*, 431 U.S. at 259-n.13 (Powell, J., concurring in judgment); *see Buckley v. Valeo*, 424 U.S. 1, 91 & n.124 (1976).

of certain functions of a union or integrated bar **and** are collected with certain "carefully tailored" procedural safeguards. *Hudson*, 475 U.S. at 302-03; *see Keller*, 496 U.S. at 13-17.

"Careful" or "narrow tailoring," at a minimum, "require[s] the government goal to be substantial, and the cost to be **carefully** calculated. Moreover, since the State bears the burden of justifying its restrictions, it must **affirmatively establish** the reasonable fit" between the restrictions and the state's objective. *Board of Trustees v. Fox*, 492 U.S. 469, 480 (1989) (emphasis added) (citation omitted).

Second, in "this context, the procedures required by the First Amendment also provide the protections necessary for any deprivation of property." *Hudson*, 475 U.S. at 304 n.13. "[E]ven the temporary or partial impairments to property rights that attachments, liens, and similar encumbrances entail are sufficient to merit due process protection." *Connecticut v. Doehr*, 111 S. Ct. 2105, 2113 (1991). The Association ignores this fact. However, even if the deprivation is only temporary, determining the adequacy of predeprivation procedures requires consideration of the private interests affected, the risk of erroneous deprivations and the probable value of additional or other procedural safeguards, and the state's interest in imposing the temporary deprivation. *Id.* at 2112.

Escrow without advance reduction satisfies neither First Amendment careful tailoring nor the due-process test. "'Precision * * * must be the touchstone' in the First Amendment context." *Hudson*, 475 U.S. at 303 n.11 (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963)). Collection of monies that indisputably will not be used for lawfully chargeable activities, even if escrowed and later rebated, is inherently **im**precise. It thus violates the First Amendment, because it is a means "substantially broader than necessary to achieve the government's interest," *Ward v. Rock Against Racism*, 491 U.S. 781, 800 (1989), in seeing that all employees subsidize only chargeable activities.

Collection of nonchargeable amounts also denies due process. It presents a **certainty** of erroneous deprivation, even if only temporary. And it adversely affects the individual's First Amendment interests in not associating with a union more than necessary

to serve the state's interest in mandatory association and in "us[ing h]is property for his own preferred political, ideological or other elected purposes." *Damiano*, 830 F.2d at 1370.

The sole rationalization the Association advances for not providing advance reduction is imagined administrative and financial burdens that would be imposed on it and the school districts that deduct the agency fees. *See* Opp. at 6. However, "administrative convenience alone is insufficient to make valid what otherwise is a violation of due process of law," *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 647 (1974); "[n]or is additional expense occasioned by [meeting the ordinary standards of due process] sufficient to withstand the constitutional requirement." *Bell v. Burson*, 402 U.S. 535, 540-41 (1971). Therefore, "the procedures mandated by *Hudson* are to be accorded all nonmembers of agency shops regardless of whether the union believes them to be excessively costly." *Andrews v. Cheshire Educ. Ass'n*, 829 F.2d 335, 339 (2d Cir. 1987); *accord Lowary v. Lexington Local Bd.*, 903 F.2d 422, 431 (6th Cir.), *cert. denied*, 498 U.S. 958 (1990).

In any event, the burdens feared by the Association are spurious, as the dissenting member of the Ninth Circuit panel explained at greater length than is possible here. *See* App. at 15a-18a. This is confirmed by the fact that at least three other teacher unions have implemented plans which provide both pre-collection notice, after the school year begins, and an advance reduction, with no apparent undue burden. *See Andrews*, 829 F.2d at 337-38; *Lehnert v. Ferris Faculty Ass'n*, 707 F. Supp. 1490, 1496-97 (W.D. Mich.), *aff'd*, 893 F.2d 335 (6th Cir. 1989), *cert. denied*, 496 U.S. 905 (1990); *Lowary v. Lexington Local Bd.*, 704 F. Supp. 1456, 1474-75 (N.D. Ohio 1988), *modified on other grounds*, 903 F.2d 422 (6th Cir.), *cert. denied*, 498 U.S. 958 (1990).

The Association asserts that the "parties have stipulated that there were legitimate reasons for [its] choice" in not providing the teachers an advance reduction. Opp. at 12 n.16 (emphasis omitted). However, all that the parties stipulated was that **the Association** "considered" advance reduction "unworkable" for the reasons it stated in the stipulation. The parties did **not** stipulate that advance reduction in fact was unworkable or that the reasons given by the

Association for not using it were legitimate in fact or law. *See id.* at 6.

III. PRE-COLLECTION NOTICE OF THE BASIS FOR THE FEE CHARGEABLE TO OBJECTORS IS REQUIRED TO FACILITATE OBJECTIONS AND ENSURE DUE PROCESS, EVEN IF THE ENTIRE FEE IS ESCROWED

The Association concedes that pre-collection notice of the basis for the fee chargeable to objectors is required if an advance reduction is required. *See id.* at 14 n.12. In that event, pre-collection notice is necessary to enable an objecting nonmember to pay only the reduced amount determined by the union.

Otherwise, the Association argues that "the 'advance notice' issue * * * is of no constitutional significance." If advance reduction is not required, all fees are escrowed until the time for objection passes, and notice precedes the hearing (which need not occur before fees are collected), the union claims "there is absolutely no reason why the notice should have to precede the first monthly payroll deduction." *Id.* at 13-14. However, there are constitutional reasons for pre-collection notice even in those circumstances.

The purpose of notice is not **only**, in general under the due process clause, to apprise an affected individual of an impending hearing, or in specific under *Hudson*, as the Association asserts, "to enable nonmembers to exercise their right to object and to prepare for the hearing" on the lawfulness of the amount of the fee before an impartial decisionmaker, *id.* at 13. Notice also serves other constitutional purposes.

In general, a "purpose of procedural due process is to convey to the individual a feeling that the government has dealt with him fairly, as well as to minimize the risk of mistaken deprivations of protected interests." *Carey v. Piphus*, 435 U.S. 247, 262 (1978); *accord Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 195 n.14 (1985). Taking an individual's property without at least first giving him notice of the grounds for the taking, and that he will later have an opportunity to challenge those grounds, conveys precisely the opposite conviction. It thus is contrary to *Hudson*'s goal of "insur[ing] that the government treads

with sensitivity in areas freighted with First Amendment concerns." 475 U.S. at 303 n.12 (emphasis added). *Cf. Barry v. Barchi*, 443 U.S. 55, 65 (1975) (a procedure under which a horse trainer's license was suspended without a pre-suspension hearing did not deny due process, because, *inter alia*, "he was immediately notified of the alleged drugging [and] 16 days elapsed **prior to** the imposition of the suspension") (emphasis added).[4]

In specific, a purpose of the procedural safeguards required by *Hudson*, 475 U.S. at 307 n.20, is to "facilitate a nonunion employee's ability to protect his rights." Collection of a compulsory fee without prior notice of its basis "present[s] the deprived party with a *fait accompli*" that discourages, rather than facilitates, challenges to the fee. *See Gilpin v. AFSCME*, 643 F. Supp. 733, 737 (C.D. Ill. 1986). As one scholar pointed out even before *Hudson*, "to effectuate fully the goals underlying *Abood*," a union should be required to make a schedule of yearly disbursements "available for inspection by all employees * * * *before* an employee has parted with his money," because there "will thus be more assurance that inertia will not persuade a dissenter to relinquish his constitutionally protected right to freedom of association." *The Supreme Court, 1976 Term*, 91 Harv. L. Rev. 70, 198 (1977) (quoted with approval in *Galda v. Bloustein*, 686 F.2d 159, 168 n.16 (3d Cir. 1982)).

Finally, the Association's claim that there is no conflict among the circuits, or within the Ninth Circuit, as to advance notice is disingenuous. *See* Opp. at 15. In *Tierney*, 824 F.2d at 1501, the union's scheme required nonmembers to pay an agency fee equal to dues **before** it provided them with information concerning the purposes for which the fees would be used. Thus, the Sixth Circuit necessarily had to decide whether the union violated the nonmembers' constitutional rights by demanding payment before it gave

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[4] *Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1 (1978), cited in the Opposition at 13 n.11, does not support the union's argument that due process never requires notice prior to a taking if a pre-taking hearing is unnecessary. *Memphis Light*, 436 U.S. at 14-15 (emphasis added), held that notice "does not comport with constitutional requirements when it does not advise the customer of the availability of a procedure for protesting a **proposed** termination of utility service." In short, the Court saw pre-taking notice as constitutionally necessary.

notice of the basis for the fee. When the court said that the scheme's "second infirmity is that it contains no provision complying with *Hudson*'s requirement that detailed financial information concerning all major categories of union expenses * * * be * * * provided to all non-members **before any fees may be collected from them**," *id.* at 1506 (emphasis added), it was stating a holding, not *dictum* as the Association pretends. Similarly, because the union in *Dean v. TWA*, 924 F.2d 805, 807 (9th Cir. 1991), demanded payment of agency fees equal to dues without notice of how they would be spent, the court there also stated a holding when it said that *Hudson* requires "that **before collecting fees** through an agency shop agreement, a union must adequately explain the basis for the fee," *id.* at 808 (emphasis added).

CONCLUSION

Whether advance reduction and advance notice must constitutionally be provided to individuals paying compulsory fees are questions which were important enough for this Court to grant certiorari in *Gibson v. Florida Bar*, 906 F.2d 624 (11th Cir. 1990), *cert. granted*, 111 S. Ct. 1305 (1991) (No.90-1102). The Court did not then settle these questions, because it dismissed the *Gibson* writ as improvidently granted after the adoption of an advance reduction system in *Florida Bar re Frankel*, 581 So. 2d 1294 (Fla. 1991), while *Gibson* was pending in this Court. *See Gibson v. Florida Bar*, 112 S. Ct. 633 (1991). Because these questions are no less important now, and because the courts of appeals are still in conflict on them, the Court should grant certiorari in this case.

Respectfully submitted,

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